The Grand Rapids Press of Booth Newspapers, Inc., A Division of the Herald Company, Inc. *and* Detroit Newspaper Local 13N, Graphic Communications International Union, AFL–CIO. Case 7–CA–40290

December 31, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On June 25, 1998, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision[1] and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Grand Rapids Press of Booth Newspapers, Inc., A Division of the Herald Company, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) On request, bargain with Local 13N as the exclusive representative of the employees in the following appropriate unit concerning any restriction in the hiring of substitutes to the Grand Rapids, Michigan area and, if an understanding is reached, embody the understanding in a signed agreement:

> All pressmen and pressmen apprentices employed by the Grand Rapids Press at its Grand Rapids, Michigan, facility, excluding the foremen, professional employees, office clerical employees, guards and supervisors, as defined in the Act."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Detroit Newspaper Local 13N, Graphic Communications International Union, AFL–CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit, by unilaterally restricting the hiring of substitutes by hiring only applicants who reside in the local Grand Rapids, Michigan area:

> All pressmen and pressmen apprentices employed by The Grand Rapid Press at its Grand Rapids, Michigan, facility, excluding the foremen, professional employees, office clerical employees, guards and supervisors, as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to immediately hire James F. Burns and Charles W. Lewis Jr., thereby placing them on the substi-

[1] In his decision, the judge relied on an earlier judge's decision in a prior *Grand Rapids Press* case. The Board subsequently adopted that decision. See *Grand Rapids Press*, 325 NLRB 915 (1998).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Brame notes that, although the Board has stated that the General Counsel bears the burden of proving gross backpay, see, e.g., *Coca-Cola Bottling Co. of Buffalo,* 313 NLRB 1061 fn. 2 (1994), the Board has applied a "broad standard" permitting the General Counsel to meet its burden by providing only a "reasonable" method of calculating gross backpay. See, e.g., NLRB Casehandling Manual (Part Three), Compliance Proceedings, Sec. 10532.1; and *Am-Del-Co.,* 234 NLRB 1040, 1042 (1978). However, Member Brame would find in the circumstances of this case that, in compliance, the General Counsel must do more than advance a "reasonable" formula for the calculation of backpay; rather, he should bear the burden of proving the days of the week that James Burns and Charles Lewis would have worked but for the Respondent's discrimination against them. See *NLRB v. Fluor Daniel, Inc.,* 161 F.3d 953 (6th Cir. 1998).

Members Fox and Liebman note that no issue has been raised in this case regarding the calculation of the backpay owed by the Respondent to discriminatees Burns and Lewis, and contrary to Member Brame, they decline to speculate that the General Counsel would act unreasonably in computing the backpay owed. Although they agree with their colleague that under Board law the General Counsel bears the burden of proving the reasonableness of his backpay claims, they note that their colleague's concerns about what the General Counsel should prove in compliance would be more properly expressed in any review of the compliance proceedings if this issue arises.

[3] We have modified the Order to more closely conform with the violations found.

tute list; and if necessary removing from the list anyone hired in their stead.

WE WILL make James F. Burns and Charles W. Lewis Jr. whole for any wage or benefits losses they may have suffered by virtue of our unlawful refusal to hire them because they engaged in a strike on behalf, or support of, Local 13N, less any interim earnings, plus interest.

WE WILL, on request, bargain with Local 13N as the exclusive representative in the above-referenced appropriate unit concerning any restriction of the hiring of substitutes by hiring only applicants who reside in the local Grand Rapids, Michigan area.

THE GRAND RAPIDS PRESS OF BOOTH NEWSPAPERS, INC.

Thomas Doerr, Esq., for the General Counsel.
Bruce H. Berry, Esq., of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on February 24, 1998, upon a complaint issued pursuant to charges filed by Detroit Newspapers Local 13N, Graphic Communications International Union, AFL–CIO (Local 13N or the Union). The charge was filed on October 7, 1997, and amended on November 25, 1997. The complaint was issued on November 27, 1997, and was amended at the hearing without objection. The complaint alleges that the Respondent violated Section 8(a)(3) of the Act by discriminatorily refusing to employ two substitute pressmen, who were referred by the Union, because they were engaged in a strike against their principal employer, the Detroit Newspaper Agency (DNA or Detroit News). The complaint further alleges that the Respondent violated Section 8(a)(5) of the Act by unilaterally changing the established referral hiring procedure between the Respondent and the Union for substitute pressmen. In its timely filed answer, the Respondent denied the material allegations of the complaint, as amended. The parties were afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses,[1] and file posthearing briefs.[2]

On the entire record, including my observation of the demeanor of the witnesses, after considering the posthearing briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Grand Rapids Press (Press or Respondent) is engaged in the publication of a daily newspaper and is an unincorporated division of Booth Newspapers, Inc., a subsidiary of The Herald Company, Inc., a New York corporation, with an office and place of business in Grand Rapids, Michigan. During the calendar year ending December 31, 1996, the Respondent, in conducting its business operations, derived gross revenues in excess of $200,000, by subscribing to various interstate news services, publishing various nationally syndicated features, and advertising various nationally sold products. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Backaround

Local 13N is an amalgamated union, headquartered in Detroit, Michigan, which serves as the exclusive bargaining representative for several different bargaining units at several different employers. Since 1967, the Union has been the exclusive representative of an appropriate unit comprised of all pressmen and pressmen apprentices employed by The Grand Rapids Press. The applicable collective-bargaining agreement, effective April 1, 1994–March 31, 1998, provides a procedure for filling in for regular full-time pressmen, who take off from work. In essence, the foreman determines how many regularly employed pressmen are needed and whether any one of them, who is off for the day, should be replaced. The union chapel chairman (shop steward), when requested by the foreman, is responsible for finding a replacement either by calling in another regular pressman, who is scheduled off for the day, or calling in a substituted.[3] The above-described procedure had always been followed until July 1995.

B. The Prior Unfair Labor Practice

On July 13, 1995, the bargaining unit employees represented by Local 13N at DNA went on strike. The following day, the Respondent's foreman, Daniel Silvernail, told the assistant chapel chair for its bargaining unit employees that he could not add pressmen to Respondent's substitute list, and specifically those pressmen who were on strike against the Detroit News. Local 13N therefore filed charges against the Respondent alleging that it had unilaterally changed the substitute referral procedure so as to discriminatorily preclude striking Detroit News pressmen from being added to the Press substitute list in violation of Section 8(a)(3) and (5) of the Act.[4]

A consolidated complaint issued and a hearing was held before Administrative Law Judge Robert M. Schwarzbart. On January 22, 1997, Judge Schwarzbart found that the Respondent, and the other affiliated newspapers, had violated Section 8(a)(3) and (1) of the Act by refusing to hire Detroit News pressmen referred to as substitutes by the chapel chairman because these employees had engaged in a strike, on behalf of, or in support of, the Union against the DNA. Judge Schwarzbart

[1] At the hearing, I reserved decision on the Respondent's motions to dismiss the material allegations of the complaint. Upon considering the record evidence, and for the reasons stated below, I now deny those motions.

[2] The General Counsel's posthearing motion to correct the record is granted.

[3] By contractual definition, the term "employee" refers only to active, regular full-time individuals "performing . . . work in the press department." The term "substitute" refers to an individual who is not an employee as defined above, but instead is a person hired by the Respondent on a temporary basis to fill production needs. (G.C. Exh. 2: par. 4.1.)

[4] Similar charges, prompted by similar changes in referral procedures, were filed against three other newspapers, The Bay City Times, The Saginaw News, and The Flint Journal, all of which are unincorporated divisions of Booth Newspapers, Inc., a subsidiary of The Herald Company, Inc.

also found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally restricting the chapel chairmen's ability to select substitutes by specifically prohibiting the future hire of substitutes from the Detroit News and limiting selection to pressmen who had worked as substitutes for the Respondent during the previous 3months. *Grand Rapids Press,* JD–10–97 (Jan. 22, 1997).[5]

Similar allegations of restricting the hiring of substitutes who engaged in the Detroit News strike, and changing the referral hiring procedure, are involved in the present case. The General Counsel therefore requests that I consider Judge Schwarzbart's findings in the prior unfair labor practice case as background evidence of animus in this case. It argues that under Board law, it is appropriate to consider prior pending cases in deciding a later related matter, especially where, as here, the allegations in the later case are substantially similar to the violations found in the prior case. *Opelika Welding,* 305 NLRB 561, 566 (1991); *Southern Maryland Hospital,* 293 NLRB 1209 fn. 1 (1989).

The Respondent argues that relying upon the prior findings is improper under applicable Board precedent. It asserts that *Opelika Welding* is distinguishable from the present case because in that case there was evidence of independent animus contemporaneous with the conduct alleged to have violated the Act. The underlying premise of the Respondent's argument is that there is no independent evidence of animus in the present case and therefore to rely on the evidence of animus in the prior proceeding is inappropriate. To begin with, the argument overlooks the fact that animus need not be proven by direct evidence; it can be inferred from the record as a whole. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). In this connection, I find, contrary to the Respondent and as explained below, that there is sufficient evidence in this record to support an inference of animus. Second, the reason the administrative law judge in *Opelika Welding* relied on the judge's findings in the prior case was because in the prior proceeding the employer displayed animus against the same type of union activity that was engaged in the subsequent case. For that reason, the judge concluded that the prior findings could be relied upon as evidence of the employer's continuing antiunion animus (citing *Southern Maryland Hospital).* Similarly, in the case before me, the General Counsel argues, and the evidence shows, that the Respondent's conduct was directed at the very same union activity that was involved in the prior case.

The Respondent, however, argues that in *Sunland Construction Co.,* 307 NLRB 1036 (1992), the Board rejected the reasoning in *Southern Maryland Hospital.* In *Sunland Construction Co.,* the Board did nothing more than affirm the decision of the administrative law judge. The judge distinguished the situation in *Sunland Construction Co.,* supra, from the situation presented in *Southem Maryland Hospital,* based on the fact that the managers involved in the prior proceedings were not the same managers involved in the subsequent proceedings. He therefore declined to impute animus from one to the other. In the present case, the same foreman, Daniel Silvernail, was involved in imposing the restriction on the use of substitutes in both situations, even though the general manager involved in the prior case, Richard Morton, had left the Respondent's employ shortly before the events giving rise to the present case.

Accordingly, I find that Judge Schwarzbart's findings in the prior case may be properly considered as evidence of the Respondent's animus toward the Union and as members in this case.

C. Rescinding the 2-Year Hiring Freeze

The Respondent's restriction on hiring substitutes continued throughout the duration of the Detroit News strike. The result being that there were no additions to the list of 12 substitutes, which existed in July 1995, even though some of the substitutes were unavailable for work.[6] For example, Chester Kaprowski was unable to work in 1995–1996 because of illness. Daniel Jerosh underwent heart surgery in 1996 and remained unavailable for work until 1997. Dave Wilcox was unavailable for almost the entire 1996 year because of the commitments of his regular full-time job. Jerry Bucema went to Florida every winter, returned in the spring, and did not work in between.

In February 1997, the Union made an unconditional offer to return to work, but not all pressmen were returned to work by DNA. A short time later, Respondent's attorney, Bruce H. Berry, phoned Local Union President Jack Howe about opening the Press' substitute list for the first time in almost 2 years. Berry told Howe that the Respondent would open the substitute list, if the Union would agree to have substitutes go through the normal hiring process, which included completing an application and being interviewed by the foreman. Howe expressed a concern about the foreman arbitrarily rejecting an applicant and therefore sought Berry's assurance that, if someone was rejected without reasonable cause, the foreman's decision would be subject to arbitration. Berry responded by saying the Union could arbitrate anything it wants.

D. The First Substitutes to APPIV After the List Opened

1. James F. Burns

James F. Burns had worked as a pressman for the Respondent, up until the early 1980s. Primarily for economic reasons, he left the Respondent at that time to work for the Detroit News. On July 13, 1995, he went on strike against the Detroit News along with the other pressmen. After the Union made its unconditional offer to return to work, the Detroit Newspapers Agency did not offer him a job.

Upon hearing that the Respondent had opened its substitute list, Burns inquired about working as a substitute on weekends. Although he lived in Lincoln Park, Michigan, which was 150 miles from Grand Rapids, he had a son living in the Grand Rapids area with whom he could stay on the weekends. In June 1997, Burns submitted an application and was interviewed by Press Foreman Daniel Silvernail, for a part-time substitute job, on Friday and Saturday nights. Silvernail did not ask Burns about the distance he would have to travel to work or in anyway suggest that commuting such a distance might present a problem, even though Burns told Silvernail that he might also be available to work on week nights if he received enough advanced notice. Silvernail gave Burns no indication at the end of the interview whether he would be added to the substitute list.

2. Charles W. Lewis Jr.

Charles Lewis had also worked for the Respondent as a pressman for approximately 20 years before leaving to work for the Detroit News. While regularly employed at the Detroit

[5] Exceptions to the decision, filed by both Respondent and the General Counsel, are currently pending before the Board.

[6] Many of the substitutes worked regular full-time jobs elsewhere as pressmen.

News, he substituted for the Respondent more than 30 times between 1980–1990, even though he lived in Battle Creek, Michigan, which is 60 miles from Grand Rapids. Like Burns, he participated in the July 1995 strike at the Detroit News. When Lewis learned that the Respondent was adding substitutes to its list, he contacted the human resource department, where he was advised that he would have to go through the hiring process. Lewis submitted an application and was interviewed by Press Foreman Silvernail. Although Lewis was residing 60 miles away in Nashville, Michigan, Silvernail did not discuss the commuting distance during the interview and gave Lewis no indication whether he would be added to the substitute list.

E. The Events which Followed the Interviews with Silvernail

Around the time that Burns and Lewis interviewed with Silvernail, Union Chapel Chairman Anthony Cecola asked if he could add them to the substitute list. Silvernail said, "No." He wanted to hire someone locally and they lived too far away. Cecola pointed out that for a Saturday night replacement, he called a substitute on the Thursday morning before the weekend, which allowed more than amble time for a substitute to make arrangements to come to work. He also pointed out that some of the regularly employed pressmen lived as far away as 50 miles from Grand Rapids. Silvernail nevertheless refused to hire Burns and Lewis.

During football season, 2 moths later, a few regular full-time pressmen wanted to take off on Saturdays in order to attend the University of Michigan football games. When Cecola again approached Silvernail about adding Burns and Lewis to the list, he received the same response, i.e., "No, they live too far away." In mid-September 1997, some other regular full-time pressmen asked Cecola about taking time off on Sundays to attend the Detroit Lions football game, but once again Silvernail refused to add Burns and Lewis to the list, explaining that they live too far away."[7]

In late November 1997, Silvernail interviewed and hired pressmen Robert Mohkne and Douglas Schoon as substitutes. Both were regularly employed elsewhere, both were members of Local 13N, and both lived in the Grand Rapids area.[8]

III. ANALYSIS AND FINDINGS

A. The Refusal to Hire Burns and Lewis

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical framework for deciding discrimination cases turning on employer motivation. First, the General Counsel must persuasively establish that the evidence supports an

> inference that protected conduct was a "motivating factor" in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Citations omitted.]

Fluor Daniel, Inc., 304 NLRB 970 (1991). In *T&J Trucking Co.,* 316 NLRB 771 (1995), the Board further stated that once the burden has shifted:

> An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. Furthermore, if an employer does not assert any business reason, other than the one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason. [Citations omitted.]

1. The General Counsel's burden of proof

In a refusal to hire case, the General Counsel specifically must establish that each alleged discriminates submitted an employment application, was refused employment, was a union member or supporter, was known or suspected to be a union supporter by the employer, that the employer harbored anti-union animus, and that the employer refused to hire the alleged discriminatees because of that animus. *Big E's Foodland,* 242 NLRB 963, 968 (1979).

Silvernail received and reviewed an employment application from Burns and Lewis, which according to him revealed where they lived. The evidence supports a reasonable inference the applications also revealed their current and prior employment history, including the fact that they were employed by the Detroit Newspaper Agency, and that they were members of Local 13N. The Respondent has submitted no evidence to the contrary. After their interviews, neither Burns nor Lewis was ever contacted again by the Respondent. Unlike the prior case, however, where Silvernail and others made statements reflecting that the hiring restriction was aimed, in part, at the striking Detroit News pressmen, there is no overt evidence of animus in this case. The question therefore is whether animus may be inferred under the total circumstances of this case. The evidence supporting such an inference is as follows:

The prior findings of Judge Schwarzbart appropriately establish an evidentiary background supporting an inference of animus. The restriction on hiring substitutes, which lasted almost 2 years, effectively perpetuated the discriminatory effects of the decision, made on or about July 13, 1995, to not hire Detroit News pressmen. The evidence in the prior proceeding showed that shortly after the Union declared a strike against the Detroit Newspapers Agency, the Respondent's foreman, Silvernail, who never before had been involved in the makeup of the substitute list, informed the Assistant Chapel Chairman Ernest Bellechasses not to hire any new pressman. The credited testimony showed that when Bellechasses inquired if Silvernail was "referring or insinuating regarding the guys in Detroit," Silvernail replied, "Something to that effect, it's got something to do about that." The then general manager, Richard Morton, also specifically stated that no pressmen working for the Detroit News or the Free Press could be added to the substitute list, which was immediately frozen thereby precluding the hiring of any substitutes for the next 2 years. Given the timing of the Respondent's conduct, and the statements made by its representatives, Judge Schwarzbart found that the Respondent's refusal

[7] The evidence discloses that throughout the entire time that Cecola sought to add Burns and Lewis to the substitute list, Danny Jerosh and one or two other substitutes were unavailable to work.

[8] Mohnke and Schoon were the only applicants, other than Burns and Lewis, to apply for substitute work.

to hire substitutes from the Detroit Newspaper Agency was prompted by hostility to the Union's strike against the newspaper. I rely on those findings as evidence tending to support an inference of animus in this case.

In addition, the timing of the decision to end the hiring freeze in the present case supports an inference of animus. Soon after the Union made an unconditional offer to return to work to DNA, the Respondent made a proposal to open the substitute list. The timing of the Respondent's proposal and the fact that the duration of the hiring restriction corresponded to length of the Detroit News strike, while not conclusive, supports the view that the hiring restriction was prompted by hostility to the Union's strike against DNA.

Futher, the Respondent's proposal to have all substitute applicants go through the hiring process raises the specter of animus because it placed Silvernail in a position to screen that standing alone might not be indicative of animus, the evidence showing that the very first applicants, who were qualified Detroit News pressman effectively referred by the Union, were not hired makes it more likely than not that the hiring procedure was discriminatorily applied in order to exclude the DNA pressmen from becoming substitutes.

I find that an inference of animus is warranted under the total circumstances proved and that the General Counsel has satisfied his initial evidentiary burden. The Respondent must now persuasively establish that its hiring decisions would have been the same in the absence of union activity.

2. The Respondent's defenses

The Respondent asserts that Burns and Lewis were not hired because they lived too far away. Specifically, Silvernail testified that there were qualified pressmen in the Grand Rapids area and therefore the Respondent sought to hire locally. He also testified that substitutes are sometimes called to work during the week with little advanced notice. The implication was that anyone who had to commute more than 45 minutes might not be able to respond to a call. Despite Silvernail's assertions, there is no evidence that a substitute's commuting distance ever presented a problem to the operation of the Press. Silvernail conceded that he never had a problem with substitutes not reporting to work because of the commuting distance. It is hard to conceive how commuting distance would be a problem, because the evidence shows that if a substitute is unavailable for assignment, for whatever reason, the chapel chairperson simply calls the next person on the list.

As far as requiring the services of a substitute on short notice during the week, the evidence establishes that the greatest need for substitutes is on a Saturday night and secondarily on the weekends. Moreover, the availability to substitute on weekdays did not seem to be a factor against hiring Mohnke and Schoon even they both worked full-time jobs, and therefore their availability to work during the week was limited. In fact, the unrebutted evidence shows that shortly after Mohnke was hired, he declared himself unavailable for any type of assignment in December 1997 because of his full-time work commitment. Thus, the evidence falls short of showing any correlation between where a substitute lived and his ability to take an assignment on short notice during the week.

In an attempt to bolster its position, the Respondent points out that the substitutes currently on the list all live within 10–15 miles of Grand Rapids, including Mohnke and Schoon, who were hired in December 1997. There is no evidence, however, that any of the substitutes were required by the Respondent to live within a specified commuting distance in order to be hired or to remain on the substitute list. To the contrary, the evidence shows that many regular pressmen do not live in the Grand Rapids area and that in the course of time substitutes have commuted considerable distances to work an assignment. For example, Lewis testified that he was living in Battle Creek, Michigan, 60 miles from Grand Rapids, when he previously substituted for the Respondent between 1980–1990. Silvernail conceded that within that time the commuting distance was not a factor in getting Lewis to work an assignment.

Contrary to the impression that Silvernail sought to foster, the evidence shows that in most instances the substitutes had ample notice to report for work regardless of where they lived. Chapel Chairman Cecola testified that he routinely notified substitutes of a Saturday work opportunity by calling them on the preceding Thursday morning, which gave the substitute more than 48 hours to make arrangements to report for work.

The Respondent also argues that Burns and Lewis were not hired because additional substitutes were not needed at the time that they applied. Silvernail's testimony in this connection was unconvincing and contradictory. He testified that when Burns and Lewis first applied in May 1997, he did not believe that the Respondent needed additional substitutes, because work normally is slow at that time of year. He further testified that he accepted applications and interviewed applicants in May 1997, in anticipation of the upcoming busy season. Silvernail then stated that he decided in September 1997, that he needed additional substitutes,[9] which was around the same time that Chapel Chairman Cecola approached Silvernail about adding Burns and Lewis to the list because some regular pressmen wanted to lay off in order to go to a Detroit Lions football game. Although he recognized the need for substitutes, Silvernail still refused to hire Burns and Lewis. In an attempt to underscore that there was no need for additional substitutes in May 1997, Silvernail testified that there were 15 substitutes on the list at that time. Silvernail then testified that he needed more substitutes in September 1997, because some of the substitutes, like Chester Kaprowski and Danny Jerosh, were unavailable for work because of medical reasons. The credible evidence reflects, however, that in May 1997, there were only substitutes on the list, rather than 15, and because Kaprowski and Jerosh were marked off for medical reasons, only 11 substitutes were available for assignments. Thus, the same number of substitutes was available in May and September. By October 1997, however, Jerosh returned from medical leave, thereby increasing the number of substitutes available. Thus, by the time Mohnke and Schoon were hired, there were actually more available substitutes on the list then at the time Burns and Lewis first applied. The evidence therefore shows that when the number of available substitutes was down in May 1997, Silvernail refused to hire Burns and Lewis, but when the number increased in October 1997, he hired Mohnke and Schoon.

Accordingly, I find that the Respondent's reasons for not hiring Burns and Lewis are pretextual. I find that had it not been for the Respondent's hostility toward the Union and its members, who engaged in a strike against the Detroit Newspaper Agency, both individuals would have been hired. I therefore

[9] Silvernail later contradicted himself by testifying that he believed in September and October 1997, that 11 substitutes was an adequate number to keep the presses running.

find that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Burns and Lewis.

B. The Refusal to Bargain Over the Decision to Hire Only Local Residents as Substitutes

It is undisputed that in the spring of 1997, Union President Howe and Respondent's attorney, Berry, agreed that in exchange for opening the substitute list all substitute applicants would be required to follow the "normal" hiring procedure. Under the normal hiring procedure, which up until then applied only to the regular full-time pressmen, there was no requirement that anyone had to reside in the local Grand Rapids area in order to be hired. To the contrary, the evidence discloses that many regular full-time pressmen lived outside the Grand Rapids area. Thus, the imposition of a local hiring restriction was not part of the normal procedure. It was a new condition of employment, which was not discussed nor negotiated between the Respondent and Union.

Accordingly, I find that by unilaterally imposing a restrictive condition upon the hiring of substitutes without first notifying the Union and obtaining its consent, the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive bargaining representative in an appropriate unit comprised of:

> All pressmen and pressmen apprentices employed by The Grand Rapids Press at its Grand Rapids, Michigan, facility, excluding the foremen, professional employees, office clerical employees, guards and supervisors, as defined in the Act.

4. By refusing to hire James F. Burns and Charles W. Lewis Jr. because they had engaged in an economic strike on behalf, and in support of, the Union, the Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By unilaterally restricting the hiring of substitutes to those who reside in the local Grand Rapids, Michigan area, without notifying the Union or obtaining as consent, the Respondent violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent refused to hire James F. Burns and Charles W. Lewis Jr. in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the Respondent be ordered to immediately offer to hire these individuals and place them on the substitute list and if necessary remove from the list, any individuals hired in their stead, and to make them whole for wage and benefit losses they may have suffered on and after May 15, 1997, by virtue of the discrimination practiced against them computed on a quarterly basis as prescribed in *F. W. Woolworth Co., 90* NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987). It will be further recommended that the Respondent be ordered to rescind the hiring restriction unilaterally imposed on the hiring of substitutes.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Grand Rapids Press, Grand Rapids, Michigan, an unincorporated division of Booth Newspapers, Inc., a subsidiary of The Herald Company, Inc., a New York corporation, as its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire substitute pressmen because such individuals have engaged in strike on behalf, or in support, of the Local 13N, or any other labor organization.

(b) Failing to bargain collectively with Local 13N, as the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate unit, by unilaterally restricting the hiring of substitutes to the Grand Rapids, Michigan area, without notice to. or obtaining the consent of, Local 1 3N. concerning:

> All pressmen and pressmen apprentices employed by The Grand Rapids Press at its Grand Rapids, Michigan, facility, excluding the foremen, professional employees, office clerical employees, guards and supervisors, as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the restriction which The Grand Rapids Press imposed on, and has maintained since May 15, 1997, restricting the hiring of substitutes to individuals who reside in the local Grand Rapids, Michigan area.

(b) Within 14 days from the date of this Order, offer to immediately hire James F. Burns and Charles W. Lewis Jr. and place them on the substitute list: if necessary remove from the substitute list any individual added in their stead.

(c) Make whole James F. Burns and Charles W. Lewis Jr. for wage and benefits losses that they may have suffered on or after May 15, 1997, by virtue of the discrimination practiced against them in the manner prescribed in the remedy section of this decision.

(d) On request, bargain with Local 13N as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All pressmen and pressmen apprentices employed by The Grand Rapids Press at its Grand Rapids, Michigan, facility, excluding the foremen, professional employees, office clerical employees, guards and supervisors, as defined in the Act.

(e) Preserve and, within 14 days of a request, make available to the Board or as agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its offices and place of business in Grand Rapids, Michigan, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 1997.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

THE GRAND RAPIDS PRESS

[11] If this Order is enforced by a Judgement of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States court of Appeals Enforcing an Order of the National Labor Relations Board."